Hastings Law Journal

Volume 59 | Issue 4 Article 5

1-2008

Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments

Vishali Singal

Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments

VISHALI SINGAL*

INTRODUCTION

The image exemplifying the way in which globalization has swept the twenty-first century is familiar—a businessman sitting helplessly on his cell phone staring at his laptop screen in his San Francisco apartment while he listens to the Indian accent of a computer whiz in a Bangalore, India call center on the other end of the line and watches her mouse navigate its way on his laptop through an Internet connection to fix the problem. Given the magnitude of interaction between countries, either through private commerce, foreign relations between governments, or the treatment of one nation's citizens by another nation, the world's legal systems have become interconnected as well. Whether the laws of one nation dispense justice in accordance with that nation's standards is now, in many circumstances, dependent upon whether the laws of another nation will recognize and enforce foreign judgments. As such, the strength of the American legal system is predicated in part upon the world's receptivity to American judgments, which in turn is influenced by America's receptivity to foreign judgments.

American case law presents a compelling picture of the interactions between nations in this era of globalization and the resulting interconnectedness of the world's legal systems. The following cases illustrate this interconnectedness. In 1973, Jack Kough, a minority shareholder of British Columbian corporation Arvee Cedar Mills, Ltd. ("Arvee"), and Merlin William Thompson, entered into an agreement

* J.D. Candidate, 2009, U.C. Hastings College of the Law; M.A. Candidate, 2009, City and Regional Planning, UC Berkeley; B.A., 2003, Architecture, U.C. Berkeley. Thank you to Professor David Levine for his continued guidance and editing throughout this process, Professor Geoffrey Hazard for his insight, and Professor William Dodge, who suggested this research topic. Thank you also to my mother Sudesh, my father Surender, brother Suneet, and friends Sukie Dhami and Rina Shah for their love and support.

with the Bank of Montreal ("the Bank"), requiring the Bank to continue engaging in business transactions with Arvee in exchange for Kough and Thompson's promise to repay $718,000 in debt, plus interest from the date the Bank demanded payment.[1] In 1975, the Bank brought suit against Kough for breach of contract in the Supreme Court of British Columbia, the "province's superior trial court,"[2] alleging that Kough and Thompson were jointly and severally liable for $842,000 under the contract.[3] Kough failed to appear in the British Columbian action after the Bank served him personally with notice in California.[4] Consequently, the Supreme Court of British Columbia rendered a default judgment against Kough.[5] After the Bank sought recognition and enforcement of the Canadian judgment in the United States, the U.S. District Court for the Northern District of California held that the Canadian judgment would be recognized "in the absence of any of the other grounds for non-recognition" listed in the California Code of Civil Procedure.[6]

The Ninth Circuit affirmed the trial court's recognition of the Canadian judgment, rejecting Kough's reliance upon a reciprocity defense that "British Columbia would refuse to recognize a default judgment rendered against one of its citizens in the United States under similar circumstances . . . ."[7] In so doing, the Ninth Circuit noted that the drafters of the Uniform Foreign Money-Judgments Recognition Act of 1962, incorporated into the California Code of Civil Procedure, had purposefully omitted reciprocity as a defense to the recognition of a foreign money judgment "on the ground that the due process concepts embodied in the [Recognition] Act were an adequate safeguard for the rights of citizens sued on judgments obtained abroad."[8]

Ten years after the Ninth Circuit decided *Bank of Montreal*, the Fifth Circuit Court of Appeals affirmed a decision by the U.S. District Court for the Northern District of Texas *not* to recognize a foreign money judgment stemming from an overdraft agreement.[9] A French bank ("the French Bank"), operating a branch office in Abu Dhabi, had brought suit against Hanna Elias Khreich, who formerly resided in Abu Dhabi but became a naturalized American citizen and a Texas resident.[10] The French Bank sought to recover 200,000 dirhams that Khreich

1. Bank of Montreal v. Jack Kough, 612 F.2d 467, 468 (9th Cir. 1980).

2. Courts of British Columbia, B.C. Supreme Court Home Page, http://www.courts.gov.bc.ca/sc/ (last visited Mar. 17, 2007).

3. *Kough*, 612 F.2d at 468–69.

4. *Id.* at 469.

5. *Id.*

6. *Id.* at 469–70.

7. *Id.* at 471.

8. *Id.* at 471–72.

9. *See* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1002–03 (5th Cir. 1990).

10. *Id.* at 1001.

allegedly owed to it, filing suit in U.S. district court.[11] Meanwhile, Khreich sued the French Bank in Abu Dhabi for the Bank's alleged breach of an agreement with Khreich, and filed a motion to dismiss the French Bank's lawsuit in district court. After the Abu Dhabi court returned a judgment in the Bank's favor, the Bank sought to enforce the Abu Dhabi judgment in district court as precluding Khreich's motion to dismiss.[12] The district court refused to recognize the Abu Dhabi judgment on two grounds: Abu Dhabi did not recognize U.S. or Texas judgments, and Abu Dhabi lacked "procedures compatible with due process of law."[13]

On appeal, the Fifth Circuit affirmed the decision, finding that the district court did not abuse its discretion in refusing to recognize the Abu Dhabi judgment.[14] Applying Texas law to determine whether the district court properly refused to recognize the Abu Dhabi judgment, the Fifth Circuit noted that the Texas Recognition Act treats non-reciprocity as a discretionary ground for non-recognition.[15] Specifically, the Texas Recognition Act states:

> A foreign country judgment need not be recognized if . . . it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of "foreign country judgment."[16]

The Fifth Circuit determined that the district court properly treated an affidavit by an American attorney practicing in Abu Dhabi, stating that he and other members of his firm were "unaware of any Abu Dhabi courts enforcing United States' judgments," as sufficient evidence of non-reciprocity.[17] Although Abu Dhabi law permits the recognition of foreign judgments in the court's discretion and although the American attorney was "unaware of any actual attempts to enforce such judgments" in Abu Dhabi, the attorney expressed concern as to whether Abu Dhabi courts would choose to recognize an American judgment.[18] Accordingly, the Fifth Circuit held that the district court did not abuse its discretion in refusing to recognize the Abu Dhabi judgment.[19]

Together these cases provide a small glimpse into the globalization phenomenon that has swept the world as early as the 1970s—as subtle as

---

11. *Id.* at 1002.
12. *See id.* at 1003.
13. *Id.*
14. *See id.* at 1006.
15. *See id.* at 1004.
16. *Id.* at 1004 n.3 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (Vernon 1986 & Supp. 1990)).
17. *Id.* at 1005.
18. *Id.* at 1005–06.
19. *Id.* at 1006.

an American citizen engaging in business transactions with neighboring country Canada and as complex as a contract and lawsuit involving entities and persons from three different regions of the world, such as a European bank, a North American citizen, and a Middle Eastern court. As modern technologies in transportation and communication create opportunities for individuals, businesses, and government entities to cross paths throughout the world at a rate higher than the world has ever experienced, the law has naturally been evolving to keep up. The law is only a catalyst for achieving justice if courts' judgments can be enforced against an individual, entity, or assets. As such, litigants throughout the world cannot always rest easy after winning favorable judgments. Instead, they must ensure that the judgments are enforced in those countries in which the judgment debtor, the losing party, resides or in which the judgment debtor's assets sit. Moreover, other circumstances might prompt a judgment creditor, the winning party, to initiate an enforcement proceeding in a country different from where the judgment was rendered. Such circumstances are illustrated in *Khreich*, where the French bank sought to enforce the Abu Dhabi judgment to preclude Khreich's claim against it in a U.S. court.

In theory, a nation's recognition and enforcement law[20] has the power to influence whether private parties will receive remedies for the harms they have suffered. When nations refuse to recognize and enforce judgments of other nations, private parties face the grueling task of re-litigating the case in a new jurisdiction if the party, as plaintiff, chooses to continue pursuing a remedy or if the party, as defendant, is subject to a new lawsuit in the new jurisdiction. Private parties' success in a subsequent lawsuit hinges partly, if not significantly, on the availability of time and money. Additionally, the treatment one nation affords to judgments rendered in other nations may impact how its own judgments are treated.

As exemplified by *Bank of Montreal* and *Khreich*, the United States lacks a unified approach to the recognition and enforcement of foreign judgments, creating complexities (and confusion) for a foreign plaintiff attempting to collect on a foreign judgment in the United States. While the district court easily recognized the Canadian judgment in *Bank of Montreal* by applying California's liberal recognition and enforcement law, the district court in *Khreich* just as easily refused to recognize the

20. Although an American court might not treat the recognition and enforcement of a foreign judgment as separate steps, they have distinct meanings. An American court "recognizes" a foreign judgment when "a forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country" and "enforces" a foreign judgment when it applies legal procedures "to ensure that the judgment debtor obeys the foreign-country judgment." UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4, cmt. 2 (2005). A court's decision not to recognize a foreign judgment constitutes a complete bar to recovery under that judgment.

Abu Dhabi judgment by applying Texas' more conservative law. In the United States, recognition and enforcement law has been reserved as an issue of state law. While the majority of states have adopted the Uniform Foreign Money-Judgments Recognition Act ("the Recognition Act") since its original drafting in 1962, some have not and many others have adopted laws that deviate slightly, but significantly, from the Recognition Act. In 1998, the American Law Institute Council (ALI) undertook the task of nationalizing the recognition and enforcement of foreign judgments by proposing a federal statute to govern the issue. In 2006, the ALI released its proposed federal statute ("the Proposed Act") which includes a reciprocity defense.[21] Under the ALI's Proposed Act, if a judgment debtor raises a reciprocity defense, a U.S. federal or state court may only recognize a foreign judgment if the foreign country rendering the judgment would recognize comparable U.S. judgments. The Proposed Act was approved at the ALI's 2005 Annual Meeting.[22]

This Note will analyze the ALI's Proposed Act, stemming from its Recognition and Enforcement of Foreign Judgments Project,[23] in the context of the reciprocity debate. Part I of this Note will detail the critical historical developments in American recognition and enforcement practice. Part II will compare American jurisprudence on recognition and enforcement to international recognition and enforcement practices. Part III will provide an analysis of the ALI's Proposed Act, focusing specifically on the effectiveness of its reciprocity defense in encouraging foreign countries to recognize and enforce American judgments. Finally, Part IV will present an argument for modifying the Proposed Act by eliminating the reciprocity defense for causes of action to enforce a foreign judgment and retaining its modified bright-line reciprocal agreement requirement in regards to the registration of foreign judgments. Such a modification would preserve justice for private litigants while encouraging foreign nations to recognize and enforce U.S. judgments.

I. THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES: UNCERTAINTY

While a plaintiff might receive a court's favorable judgment in a civil action, he or she could be precluded from pronouncing victory by the laws regarding the recognition and enforcement of foreign judgments in

21. *See* AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 14–16 (2006) [hereinafter PROPOSED ACT].

22. *See* AMERICAN LAW INSTITUTE, ACTIONS TAKEN WITH RESPECT TO DRAFTS SUBMITTED AT 2005 ANNUAL MEETING 15 (2005), https://www.ali.org/ali/AM05ActionsTaken.pdf.

23. This ALI project was previously titled the International Jurisdiction and Judgments Project. *See* American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, http://www.ali.org/ali/Intl_Juris_Proj.htm (last visited Mar. 17, 2008).

the country in which he or she seeks to enforce the judgment. When an individual brings a civil action to enforce a foreign judgment in the United States, he or she is confronted with various approaches to the recognition and enforcement of that particular judgment since each state has unfettered discretion to shape its law on the issue. Additionally, an individual holding a favorable American judgment must determine whether the laws governing the recognition and enforcement of American judgments in the country in which enforcement is sought stem from federal or state law, statutes or common law, and bilateral or multilateral treaties. The current complexities of international and U.S. recognition and enforcement law have compelled the United States to clarify, and present cohesively, recognition and enforcement law which best protects the interests of its citizens. A historical and comparative look into U.S. and international recognition and enforcement law lays the groundwork for an analysis of this unified approach.

A. REDEFINING AMERICAN JURISPRUDENCE ON COMITY

In writing the "De Conflictu Legum," a comprehensive theory of conflicts of law, Seventeenth Century Dutch jurist Ulrich Huber was arguably the most influential scholar on the development of American conflicts of law theory.[24] His "De Conflictu Legum" includes three maxims which many legal scholars consider to be influential upon the Anglo-American doctrine of territoriality of laws.[25] Describing the force of a sovereign's laws outside of its territory, Huber proclaimed in one maxim: "Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects."[26]

Huber acknowledged a sovereign's right to reject application of foreign law within its own territory.[27] However, he also recognized that

> [a]lthough the laws of one country can have no direct force in another country . . . nothing could be more inconvenient to the commerce and general intercourse of nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in law.[28]

---

24. *See* James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 74–75 (1990).

25. *See* Ernest G. Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247, 272 (1920).

26. *Id.* (quoting Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 403 (1919)).

27. *See* Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 119 (2002).

28. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public*

Centuries ahead of his time, Huber's words evince the realities of the twenty-first century—a network of independent sovereigns interlinked on a day-to-day basis. The doctrine of comity, introduced by Huber as "courtesy" between nations, "'involving . . . mutual recognition of [their] legislative, executive and judicial acts,'"[29] advanced the principle of sovereignty while alleviating the inconvenience created by invalidating transactions in another nation simply because they were subject to a different body of law.

Huber's doctrine of comity influenced American jurist Joseph Story such that it entered Story's *Commentaries on the Conflict of Laws* ("Commentaries").[30] After the Commentaries were accepted by England and the United States, and following persuasive English decisions by Lord Mansfield adopting comity, the doctrine naturally embedded itself in American jurisprudence.[31]

In 1895, the doctrine was radically altered in the United States and never quite found stable footing again. That year, in the infamous case of *Hilton v. Guyot*,[32] the Supreme Court redefined comity, and in so doing, destabilized U.S. recognition and enforcement law. In *Hilton*, a French partnership brought suit in the United States to enforce its favorable judgment against an American partnership because the American partnership had liquidated its business assets in France during French litigation proceedings.[33] Turning to the doctrine of comity, Justice Gray famously remarked:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[34]

Justice Gray conditioned the exercise of comity to recognize and enforce a foreign judgment on whether: (1) both parties had an "opportunity for a full and fair trial abroad"; (2) the trial was before a court of "competent jurisdiction"; (3) the defendant was afforded due

---

and Private International Law, 76 AM. J. INT'L L. 280, 282 (1982).

29. Stevens, *supra* note 27, at 119 (quoting Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 15 (1991)).

30. *See* N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 619 (2006); *see also* Maier, *supra* note 28, at 283 (discussing Story's idea of comity from Huber's writings).

31. *See* Calamita, *supra* note 30; Maier, *supra* note 28, at 283 n.8 (citing Lord Mansfield's decisions in *Robinson v. Bland*, 2 Bur. 1077, 1 W.Bl. 234, 259 (1760), and *Holman v. Johnson*, (1775) 1 Cowp. 341).

32. 159 U.S. 113, 163–65 (1895).

33. *See id.* at 115–16.

34. *Id.* at 163–64.

notice or voluntarily appeared before the court; (4) the proceedings were "under a system of jurisprudence likely to secure an impartial administration of justice"; (5) the proceedings were not tainted by fraud or prejudice; and (6) no other special reason precluded the enforcement and recognition of the foreign judgment.[35] Justice Gray, however, did not render a judgment based on these criteria, which he noted followed judicial trends in the United States and England and the lead of Chancellor Kent and Justice Story.[36] Instead, Justice Gray proclaimed:

> [T]here is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of *reciprocity*, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.[37]

France's refusal to recognize and enforce American and other foreign judgments was the basis for the Court's refusal to give conclusive effect to the French judgment.[38] With the stroke of a pen, Justice Gray introduced a reciprocity requirement into U.S. recognition and enforcement law that was vigorously opposed by four justices in dissent.[39] Although reciprocity was not alien to countries around the world, its introduction in the United States turned U.S. recognition and enforcement law on its head.

B. UNPREDICTABILITY IN THE UNITED STATES: THE UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT AND THE RESTATEMENTS

While the *Hilton* decision created a dramatic change in ideology behind U.S. recognition and enforcement law, the change was short-lived. In 1926, the New York Court of Appeals, in *Johnston v. Compagnie Generale Transatlantique*, limited *Hilton*'s reach in observing that state courts "will recognize private rights acquired under foreign laws."[40] Twelve years later, the *Hilton* reciprocity requirement was weakened yet again. In *Erie Railroad Co. v. Tompkins*,[41] the Supreme Court held that general federal common law does not exist, and that federal courts sitting in diversity must apply the substantive laws of the states in which they sit.[42] Consequently, federal courts sitting in diversity reject reciprocity as a condition to the recognition and enforcement of a

35. *Id.* at 202–03.
36. *Id.* at 202.
37. *Id.* at 210 (emphasis added).
38. *See id.*
39. *See id.* at 229–34 (Fuller, C.J., dissenting).
40. 152 N.E. 121 (Ct. App. N.Y. 1926).
41. 304 U.S. 64, 78 (1938).
42. *Id.*; *see also* Katherine R. Miller, Note, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 251 (2004) (discussing the effects of *Erie* on the *Hilton* doctrine).

foreign judgment if the applicable state law rejects reciprocity.[43]

Today, *Hilton*'s demise is reflected in three sources, the Uniform Foreign Money-Judgments Recognition Act, the Restatement (Second) of Conflict of Laws, and the Restatement (Third) of Foreign Relations.[44]

1. The Uniform Foreign Money-Judgments Recognition Act

The Uniform Foreign Money-Judgments Recognition Act, adopted in 1962 by the National Conference of Commissioners on Uniform State Laws, has been enacted by at least thirty-one states as of 2005.[45] The Recognition Act was revised in 2005 and renamed the Uniform Foreign-Country Money Judgments Recognition Act. The Recognition Act requires that at a minimum, a foreign money-judgment be "final, conclusive and enforceable" under the law of the foreign country where rendered to be recognized.[46] The Recognition Act delineates two sets of defenses to recognition—mandatory and discretionary. Under the "mandatory" defenses, a foreign judgment may not be recognized if the foreign court system: (1) suffers from partiality or deprives litigants of due process; (2) lacks personal jurisdiction over the defendant; or (3) lacks subject matter jurisdiction over the defendant.[47] The "discretionary" defenses permit a court to refuse recognition if: (1) the defendant in the original proceeding did not receive adequate notice; (2) the judgment was procured through fraud; (3) the judgment or cause of action is "repugnant" to the state's or United States' public policy; (4) the judgment creates conflict with another final and conclusive judgment; (5) the court proceedings conflicted with the parties' agreement for dispute resolution; (6) the foreign court constituted a seriously inconvenient forum where jurisdiction was based solely on personal service; (7) circumstances surrounding the judgment raise substantial doubt about the integrity of the rendering court with respect to the foreign-country judgment; or (8) the specific proceedings leading to the foreign-country judgment were inconsistent with the requirements of due

43. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. Rev. 253, 262 (1991); *see also* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1002–03 (5th Cir. 1990) ("Since the jurisdiction of this court is based on diversity of citizenship, we apply Texas law regarding the recognition of foreign country money-judgments."); Somportex, Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) ("[B]ecause our jurisdiction is based solely on diversity, 'the law to be applied . . . is the law of the state,' in this case, Pennsylvania law . . . . Pennsylvania distinguishes between judgments obtained in the courts of her sister states, which are entitled to full faith and credit, and those of foreign courts, which are subject to principles of comity." (quoting *Erie*, 304 U.S. at 78)).

44. *See* Stevens, *supra* note 27, at 127–28.

45. *See* John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S.—A Matter of State Law in Federal Courts*, 13 U.S.-MEX. L. J. 85, 87 (2005).

46. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, *supra* note 20, § 3(a)(2), 4(A). The 2005 Recognition Act does not extend to non-monetary judgments, nor does it extend to judgments regarding taxes, fines, penalties, or matrimonial and familial support. *Id.* § 3(b)(1)–(3).

47. *See id.* § 4(b)(1)–(3).

process of law.[48] The seventh and eighth discretionary defenses were added in the 2005 amendment of the Recognition Act.

While the Recognition Act was designed to "'create greater recognition of the state's judgments in foreign nations . . . by informing the foreign nations of particular situations in which their judgments would definitely be recognized,'"[49] scholars fear that the Recognition Act has failed, and will continue to fail, to secure foreign countries' confidence in U.S. recognition and enforcement law. The Recognition Act in its current form will not encourage foreign countries to be more receptive to U.S. recognition and enforcement claims. As Professor Brand describes:

> The greatest disadvantage of the [Uniform Recognition Act] is that uniformity is so elusive . . . . Even more troublesome is the damage to uniformity engendered when states have modified the [Recognition Act] in order either to make reciprocity a discretionary ground for nonrecognition or to make all grounds for nonrecognition, including reciprocity, mandatory.[50]

While a majority of states have adopted the 1962 version of the Recognition Act, not all have limited the defenses to recognition to those laid out in that act. At least two states have enacted legislation requiring reciprocity as a mandatory condition to the recognition of a foreign judgment: Georgia and Massachusetts.[51] At least five others, Florida, Idaho, North Carolina, Maine, and Texas, have codified lack of reciprocity as a discretionary defense to recognition.[52] Additionally, while New York and California have not adopted a lack-of-reciprocity defense in their versions of the Recognition Act, those states may choose to enforce the *Hilton* reciprocity rule where the defendant is a U.S. citizen.[53] Nevertheless, the majority of states, regardless of whether they have adopted the Recognition Act to any extent, appear to reject reciprocity.[54]

2. *The Restatements*

Likewise, the Restatement (Third) of Foreign Relations ("Restatement of Foreign Relations") and the Restatement (Second) of

48. *Id.* § 4(c)(1)–(8).

49. Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67, 89 (2006) (quoting Guinness PLC v. Ward, 955 F.2d 875, 884 (4th Cir. 1992)).

50. Brand, *supra* note 43, at 288.

51. *See* Richard H. M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at* Hilton v. Guyot*; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1, 37 (1999); *see also* GA. CODE ANN. § 9-12-138 (1993); MASS. ANN. LAWS ch. 235, § 23A (LexisNexis 2007).

52. ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 27 n.116 (2007).

53. *Id.* at 27–28.

54. *See* PROPOSED ACT, *supra* note 21, § 7 reporters' note 3.

Conflict of Laws ("Restatement of Conflict of Laws") mirror states' laws rejecting reciprocity as a precondition to recognition of a foreign-money judgment. The Restatement of Foreign Relations states that, absent any valid defenses in the Restatement of Foreign Relations, a "final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States."[55] Furthermore, "[a] judgment otherwise entitled to recognition *will not be denied* recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed."[56] The Restatement of Foreign Relations rejects reciprocity as a condition or discretionary defense to recognition and enforcement in accordance with the practices of most states, which recognize and enforce foreign judgments based on international comity.[57] The scope of the Restatement of Foreign Relations is not confined to money judgments, as is the Recognition Act.[58]

The Restatement (Second) of Conflict of Laws,[59] while primarily addressing the recognition and enforcement of federal and sister state judgments,[60] states that an American court is permitted to recognize and enforce a "valid" foreign judgment.[61] It, too, acknowledges that the majority of state courts and federal courts in diversity cases omit reciprocity as an element to the recognition analysis.[62]

While both the Restatement of Foreign Relations and the Restatement of Conflict of Laws permit the recognition and enforcement of foreign judgments falling within their scope, the requirements for and defenses to recognition and enforcement provided under each Restatement differ slightly. Under the Restatement of Foreign Relations, a court is prohibited from recognizing a foreign judgment if: (1) the foreign judicial system lacks impartial tribunals or procedures in accordance with due process of law; or (2) personal jurisdiction was absent under the foreign state's law as well as the Restatement of Foreign Relations.[63] An American court has the discretion to refuse recognizing a foreign judgment in six circumstances characterizing the

55. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481(1) (1987).

56. *Id.* cmt. d (emphasis added).

57. *See id.* reporters' note 1.

58. *See id.* reporters' note 2.

59. The Restatement of Conflict of Laws extends to money-judgments, orders, injunctions, decrees, and judgments of probate courts, admiralty courts, and other special courts. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 cmt. a (1971).

60. *See id.*, introductory note.

61. *Id.* § 98.

62. *See id.* § 98 cmt. f.

63. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(1)(a)–(b) (1987).

judgment: (1) lack of subject matter jurisdiction; (2) lack of timely notice; (3) the judgment was obtained by fraud; (4) the judgment or underlying cause of action is repugnant to public policy of the state where recognition is sought or of the United States; (5) conflict with another recognized judgment; or (6) conflict with an agreement by the parties to litigate in a different forum.[64]

The Restatement of Conflict of Laws also covers these requirements and defenses to recognition and enforcement, but in different forms. The Restatement of Conflict of Laws mandates that the foreign judgment be "valid" to be recognized, meaning the foreign court must have judicial jurisdiction; provide a reasonable method of notice and opportunity to be heard; be competent; and validly exercise power based on the foreign nation's standards.[65] Additionally, the Restatement of Conflict of Laws requires, as a condition to recognition, that *Hilton*'s six requirements are satisfied. These requirements include that a system of jurisprudence be present that is "likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, in the system of laws under which it is sitting, or fraud in procuring the judgment."[66]

Major discrepancies do not exist between both Restatements, but a slight distinction does. Under the Restatement of Foreign Relations Law, lack of timely notice and the presence of fraud are discretionary defenses to recognition and enforcement. That is, they must be raised as defenses by the judgment debtor and must be accepted by the presiding American court as such. Under the Restatement of Conflict of Laws, however, an American court must not recognize or enforce a foreign judgment when either of these "defenses" exists, regardless of whether they are presented as defenses by the judgment debtor. Regardless of these minor discrepancies, both Restatements, as well as the Recognition Act, reflect the law of most states on recognition and enforcement: that reciprocity is not required.

II. THE WORLD'S RESPONSE TO UNPREDICTABILITY: FOREIGN APPROACHES TO THE RECOGNITION OF U.S. MONEY-JUDGMENTS

Although the majority of state and federal courts in the United States have not adopted reciprocity as a precondition to recognition, nor considered reciprocity a discretionary defense to recognition, the same cannot be said about foreign nations in recognizing and enforcing U.S. money-judgments. As of 2001, at least seven major U.S. trading

64. *See id.* § 482(2)(a)–(f).
65. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92(a)–(d) (1971).
66. *Id.* § 98 cmt. c.

partners—Mexico, England,[67] Canada, China, Japan, Spain and Germany—require reciprocity to some degree before they will recognize and enforce a U.S. money-judgment.[68]

In the common law countries of England and Canada, a U.S. money-judgment will only be recognized and enforced through expedited processes if statutory reciprocal arrangements exist between the respective nation and the United States. England has no such arrangement with the United States, forcing U.S. litigants to seek recognition and enforcement through England's common law as opposed to England's Foreign Judgments Reciprocal Enforcement Act, which provides for a registration process.[69] As Canada follows a federal system like the United States, the law of recognition and enforcement is reserved for its individual provinces. Absent a statutory reciprocal arrangement between the appropriate province and the United States, a U.S. litigant must rely on a common law cause of action.[70] No such arrangement currently exists. To complicate the process further, the statutory reciprocal arrangements that do exist are only with a limited number of states bordering Canada.[71]

Civil law countries follow different approaches. In Spain, reciprocity is required where a convention or treaty does not exist between Spain and the state in which the money-judgment originated.[72] Accordingly, U.S. money-judgments are subject to a reciprocity requirement in Spain.[73] Similarly, Germany will not recognize a U.S. money-judgment if

---

67. As referenced in this Article, "England" refers to one country within Great Britain, not the whole island of Great Britain (England, Scotland, and Wales) or the United Kingdom (Great Britain and the Northeast part of Ireland).

68. *See* COMM. ON FOREIGN AND COMP. LAW, ASS'N OF THE BAR OF THE CITY OF N.Y., SURVEY ON FOREIGN RECOGNITION OF U.S. MONEY JUDGMENTS 18–20 (2001) [hereinafter SURVEY ON FOREIGN RECOGNITION]; Brandon B. Danford, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?*, 23 REV. LITIG. 381, 400 (2004) (discussing the recognition and enforcement of U.S. judgments in Germany).

69. *See* Foreign Judgments (Reciprocal Enforcement) Act 1933 (c.13), *available at* http://www.statutelaw.gov.uk/ (in the title field enter "foreign judgments"; then select "go"; select the "Foreign Judgments (Reciprocal Enforcement) Act 1933" hyperlink).

70. *See* 1 ENFORCEMENT OF MONEY JUDGMENTS, at Can-10 (Lawrence W. Newman ed., 2006) ("Legislation which provides for enforcement of foreign judgments upon registration has been enacted in all of the provinces and territories except Quebec . . . . They provide a procedure whereby a foreign judgment from a 'reciprocating jurisdiction' may be registered and, once registered, enforced as though it were a judgment rendered by the courts in that province."). The United States is not mentioned as a reciprocating jurisdiction for purposes of Canadian registration. *Id.*

71. *See* SURVEY ON FOREIGN RECOGNITION, *supra* note 68, at 18–19.

72. *See id.* at 19.

73. *See id.* at 19–20; *see also* 3 ENFORCEMENT OF MONEY JUDGMENTS, *supra* note 70, at SPA-17 to -19. Under the Spanish reciprocity regime, recognition alone may not satisfy the reciprocity requirement. Specifically, a Spanish court "may require [a U.S. money judgment] to comply with the prerequisites which a similar Spanish judgment would have to meet in order to be enforced in the country of origin." *Id.* at SPA-15. For example, if U.S. courts are willing to recognize certain Spanish judgments but still review the merits of a case, a Spanish court will treat a U.S. money-judgment

the United States will not enforce a similar German judgment.[74] Under Japanese law, reciprocity too is a prerequisite to recognition.[75] China and Mexico, on the other hand, appear more flexible, treating reciprocity as a factor to be considered at the discretion of the court.[76]

A. IMPLICATIONS OF FOREIGN RECOGNITION AND ENFORCEMENT PRACTICES: THE BRUSSELS/LUGANO RECOGNITION SYSTEM

As many of the Unites States' primary trading partners consider reciprocity to some degree in deciding whether to recognize and enforce a U.S. money-judgment, some scholars have argued that the United States' generosity in recognizing and enforcing foreign money-judgments has backfired. The reciprocity provisions imposed by foreign nations are, to a large extent, the consequence of the United States' failure to enter bilateral or multilateral treaties with those nations. Scholars have argued that, in light of the treaties that do exist between foreign nations and the lack of treaties between those nations and the United States, U.S. money-judgments have received less favorable treatment in foreign nations.[77] The Brussels Convention (the "Convention") illustrates this argument.

The Convention was signed by the original member states of the European Community ("E.C."): Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands, in 1968.[78] The Convention requires that one contracting state recognize the judgment rendered by another contracting state, so long as that judgment is civil or commercial in nature.[79] The Convention includes five defenses to the recognition of a

---

similarly, reviewing the merits of the judgment before deciding whether to recognize it. *See* SURVEY ON FOREIGN RECOGNITION, *supra* note 68, at 19–20.

74. *See* 1 ENFORCEMENT OF MONEY JUDGMENTS, *supra* note 70, at FRG-21 to -22. Reciprocity is one of five exceptions that will preclude a German court from recognizing a foreign judgment (mandatory grounds for non-recognition). *Id.* The other four exceptions are: (1) the foreign court lacks "minimal jurisdiction qualifications" defined by German law; (2) notice to the defendant was improper; (3) the foreign judgment conflicts with proceeding commenced earlier, foreign or German; and (4) enforcement would interfere with "basic German legal principles." *Id.*

75. *See* SURVEY ON FOREIGN RECOGNITION, *supra* note 68, at 19; *see also* 2 ENFORCEMENT OF MONEY JUDGMENTS, *supra* note 70, at JAP-21 to -22.

76. See SURVEY ON FOREIGN RECOGNITION, *supra* note 68, at 18–19; *see also* 1 ENFORCEMENT OF MONEY JUDGMENTS, *supra* note 70, at CHI-HK-25 to -26 ("The Chief Executive in Council also has the power to revoke any order extending the FJREO [Foreign Judgments Reciprocal Enforcement Ordinance] to a particular country, and may specifically do so on the grounds of lack of reciprocity.").

77. *See* Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT'L L.J. 1, 13–14 (2004) ("Americans are being whipsawed by the European approach. Not only are they still subject (in theory) to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend (in practice) to receive short shrift in European courts.").

78. *See* Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Preamble, Sept. 27, 1968, 8 I.L.M. 229 (1969) [hereinafter Convention]; *see also* Danford, *supra* note 68, at 390.

79. *See* Convention, *supra* note 78, at arts. 21, 26. Additionally, the Convention does not apply to:

contracting party's judgment. A judgment will not be recognized:

> 1. if such recognition is contrary to public policy in the State in which recognition is sought;
>
> 2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defense;
>
> 3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;
>
> 4. if the court of the State of origin, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State;
>
> 5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the state addressed.[80]

The Convention does not provide for a reciprocity defense.[81]

Similarly, the Lugano Convention, signed in 1988 by six original member states of the European Free Trade Association, Norway, Sweden, Finland, Austria, Iceland, and Switzerland,[82] was designed to "exten[d] the principles of [the Brussels] Convention to the States [which are] parties to this instrument [to] strengthen legal and economic cooperation in Europe . . . ."[83]

Arguably, both the Brussels and Lugano Conventions discriminate against the United States in various ways. For example, the Brussels Convention prohibits "exorbitant . . . jurisdiction" as the only source of jurisdiction for a cause of action against the domiciliary of one contracting state brought in the court of another contracting state.[84] Exorbitant jurisdiction has been defined as "jurisdiction validly exercised

---

> 1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, and analogous proceedings; 3. social security; and 4. arbitration.

Id. at art. 1.

80. *Id.* at art. 27.

81. *See id.*

82. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 620 (1989) [hereinafter Lugano Convention]; *see also* Annex to the Agreement Amending the Convention Establishing the European Free Trade Association: Consolidated Version of the Convention Establishing the European Free Trade Association 3 (2001).

83. Lugano Convention, *supra* note 82, at Preamble.

84. Danford, *supra* note 68, at 398.

under the jurisdictional rules of a state that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction."[85] Since the United States is not a party to the Brussels Convention, a judgment rendered against a U.S. litigant based solely on exorbitant jurisdiction would *not be* prohibited from enforceability in all signatory states to the Brussels Convention because of its jurisdictional basis.[86] However, if this same judgment were rendered against a domiciliary of a signatory state to the Brussels Convention, it would automatically be rejected by the non-forum signatory states.

B. The Obstacles to Recognition of U.S. Judgments Abroad

Although the United States may not receive the same preferable treatment afforded to contracting parties of the Brussels or Lugano Conventions, or other treaties for that matter, the primary reason why U.S. money-judgments are not recognized abroad as often as foreign money-judgments are recognized in the United States in the absence of treaties is unclear. Although empirical data is unavailable to demonstrate how often U.S. judgments are refused recognition and enforcement in foreign nations, scholars have noted that "some countries are particularly hostile to recognition or enforcement of U.S. judgments."[87] Foreign nations may invoke a number of defenses to recognition, such as lack of personal jurisdiction, inadequate notice, and conflicts with prior final judgments.[88] Two additional potential obstacles, to be addressed here, are: (1) the lack of reciprocity by the U.S. state in which the judgment was rendered or the state whose law governed the claim heard by a U.S. federal court with diversity jurisdiction; or (2) that the U.S. judgment is in violation of the foreign jurisdiction's public policy.

1. *Lack of Reciprocity*

The task of sorting through the United States' current system for the recognition and enforcement of foreign money-judgments is daunting to any foreign litigant. In theory, the United States' fifty states may have various approaches to recognition and enforcement. Unfortunately, this theoretical framework is not far from the truth.

For example, suppose a Spanish manufacturer ("S") entered into a contract with a Texas corporation ("T") for the sale of boots. A fallout

85. Kathryn A. Russell, Note, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as Impetus for United States Action*, 19 Syracuse J. Int'l L. & Comp. 57, 59 (1993) (citing H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 Colum. L. Rev. 995 (1967)).

86. *See* Danford, *supra* note 68, at 398–99.

87. Linda Silberman, *On the Occasion of His Retirement: A Tribute to Professor Harold G. Maier: Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier*, 39 Vand. J. Transnat'l L. 1427, 1435 (2006) (citing Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions (Gerhard Walter & Samuel P. Baumgartner eds., 2000)).

88. *See generally* Survey on Foreign Recognition, *supra* note 68.

ensued and T brought suit against S in Texas state court for breach of contract. Upon receiving a favorable judgment, T sought to enforce the judgment against S's assets in Spain. Since Spain requires reciprocity as a precondition to the recognition of U.S. money-judgments, its court would have to determine whether Texas state courts would enforce a Spanish money-judgment in similar circumstances. However, since Texas treats reciprocity as a discretionary defense to recognition and enforcement of foreign money-judgments, whether Texas would recognize and enforce a Spanish judgment would depend upon two factors: whether the judgment debtor would raise the reciprocity defense in the first place and if so, whether a Texas court would refuse to recognize the judgment based on this defense. Consequently, Spanish courts, not knowing whether its judgments would be recognized and enforced in Texas, would be unable to determine whether its own reciprocity requirement were satisfied such that T could recover its favorable judgment against S' assets in Spain.

Professor Brand details the inherent problems a foreign court must tackle in determining whether to recognize and enforce U.S. money-judgments. If the judgment is rendered by a U.S. federal district court sitting in diversity, the foreign court "is forced to try to understand the United States federal system and the manner in which *Erie* requires a federal court in the United States to look to state law."[89] Additionally, the foreign court must decipher the appropriate state law from state statutes, state case law, or in the absence of either, federal case law or inferences from sister states' laws.[90] The burden placed upon nations to discern the laws of other nations is not a new allocation of responsibility. However, the problem confronted by foreign nations deciphering the recognition and enforcement laws of the United States is that, in regards to those states that permit reciprocity as a discretionary defense, the law itself does not provide certainty to foreign nations. They are still unclear as to whether those states will recognize and enforce foreign judgments.

2. *Violation of Public Policy*

U.S. judgments awarding punitive damages or multiple damages—damages doubling or even tripling the actual compensatory damages incurred—have been rejected by a number of foreign jurisdictions as well.[91] In general, common law countries refuse to reward a party beyond actual damages suffered by enforcing contractual "penalty clauses" and civil law countries follow a "public policy rationale . . . to favor compensation over deterrence in civil matters."[92] Similarly, then, these

89. Brand, *supra* note 43, at 282.

90. *See id.*

91. *See* SURVEY ON FOREIGN RECOGNITION, *supra* note 68, at 9–10; Stevens, *supra* note 27, at 128 (citing EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1202 (3d ed. 2000)).

92. SURVEY ON FOREIGN RECOGNITION, *supra* note 68, at 10.

countries generally reject damages exceeding that required to remedy actual harm incurred by a party, whether by a limited amount (double or treble damages) or by an extreme amount (punitive damages).

III. THE AMERICAN LAW INSTITUTE'S RESPONSE TO UNPREDICTABILITY: THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS PROJECT

Regardless of the precise reasons why U.S. judgments may not be recognized as frequently as foreign judgments are recognized in the United States, scholars have agreed that U.S. law must be re-evaluated and revised to protect U.S. litigants seeking to enforce favorable judgments in foreign nations. Consequently, beginning in 1998, the ALI began work on the Recognition and Enforcement of Foreign Judgments Project (previously titled the International Jurisdiction and Judgments Project),[93] which entailed drafting a Proposed Foreign Judgments Recognition Act.[94] Concurrently, over forty countries were negotiating a Convention on Jurisdiction and the Recognition of Foreign Judgments (the "Jurisdiction Convention").[95] Accordingly, the ALI worked on two draft statutes, one implementing the Jurisdiction Convention in the United States (Plan A) and one as a draft federal statute for the U.S. recognition and enforcement of foreign judgments (Plan B).[96]

The most significant progress was made on the Plan B draft statute, not the Plan A implementing legislation. In 2006, the ALI released a final proposed statute ("the Proposed Act").[97] As such, this discussion will focus on the Proposed Act's potential as a source of U.S. law on the recognition and enforcement of foreign judgments. The Proposed Act constitutes a major departure from American jurisprudence on recognition and enforcement for the past century. Its most controversial provision, and the focus of my analysis, is its inclusion of a reciprocity defense.

In attempting to protect U.S. litigants from the less-than-favorable treatment currently provided to U.S. money-judgments in foreign nations, the ALI devoted section 7 of the Proposed Act to establishing a reciprocity scheme for the recognition of foreign judgments. Specifically, section 7(a) of the Proposed Act demands that foreign judgments not be enforced if "the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the

93. *See* Memorandum from Professor Andreas F. Lowenfeld & Professor Linda Silberman to the ALI Council for the Project on Jurisdiction and Judgments Convention (Nov. 30, 1998), *available at* http://www.ali.org/ali/1999_Lowen1.htm.

94. *See* Stevens, *supra* note 27, at 130 (citing REPORTER'S SUMMARY TO MEMBERS OF THE AMERICAN LAW INSTITUTE, at xi (2000)).

95. *See id.*

96. *See id.*

97. *See generally* PROPOSED ACT, *supra* note 21.

state of origin."[98] The ALI Reporters' Notes carefully distinguish between the discretion currently allotted to courts under state law to determine whether lack of reciprocity should constitute a defense to recognition and enforcement and the lack of such discretion afforded to them under the Proposed Act:

> [M]ost of the states that have included a provision on reciprocity in their version of the Uniform Foreign Money-Judgments Recognition Act have authorized, but not required, their courts to deny recognition or enforcement on the ground of lack of reciprocity, thus leaving the decision to the discretion of the trial court. This Act, designed to achieve uniformity throughout the United States, rejects discretion in this context. While the role of the judge is important in making the determinations called for by subsections (b), (c), and (d), if these determinations result in a finding of lack of reciprocity, subsection (a) provides that a foreign judgment *shall not* be enforced.[99]

Under section 7(b), the judgment debtor carries the burden to raise the reciprocity defense. Subsequently, the judgment debtor must prove "that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States."[100] If the judge determines that the judgment debtor has made a sufficient showing of lack of reciprocity, he or she *must* refuse to recognize the foreign judgment, a departure from some states' current practice.[101] On the other hand, reciprocity is conclusively established, without any judicial determination, if the Secretary of State has negotiated a bilateral agreement on reciprocal practices with the foreign country in question. Section 7(e) permits the Secretary of State to enter such agreements.[102] Even if a bilateral agreement does not exist, the foreign nation will not be automatically deemed to have failed the reciprocity test.[103]

Many scholars agree that uniformity in the U.S. recognition and enforcement of foreign judgments is long overdue and that the ALI's Proposed Act could be the catalyst for such reform. The heated debate, however, is about whether a reciprocity requirement ought to be included in the Proposed Act. This section will first critique the effectiveness of the ALI's Proposed Act, taking into account the ALI's goal to induce foreign nations to recognize and enforce U.S. judgments. Some arguments made in support of and against a reciprocity defense are briefly addressed here. Second, this section will include a suggestion as to what extent, if any, a reciprocity requirement might be properly included

98. *Id.* § 7(a).
99. *Id.* § 7 reporters' note 4.
100. *Id.* § 7(b).
101. *See id.* § 7(a).
102. *See id.* § 7(e).
103. *See id.*

in the Proposed Act.

A. Reaching Too Far: The Breadth of the Proposed Act's Reciprocity Requirement

The Proposed Act is a drastic 180-degree turn from current American jurisprudence on the recognition and enforcement of foreign judgments not only because it includes a reciprocity defense to recognition, but also because this defense is extended to money-judgments *and* non money-judgments alike. While judgments traditionally within the scope of public law, e.g., judgments for taxes, fines, and penalties, need not be recognized and enforced under the Proposed Act, they may be recognized and enforced so long as the Proposed Act's requirements are satisfied.[104] Judgments related to family matters (judgments for divorce, support, maintenance, and custody, for example), bankruptcy, liquidation, arbitration agreements, and arbitration awards are completely excluded from the Proposed Act's reach,[105] such that their recognition and enforcement would continue to be governed by state law. Aside from these distinct spheres, however, a U.S. court would be free to, and in fact required to, refuse to recognize and enforce a foreign judgment, be it for damages, an injunction, or declaration, absent reciprocal recognition and enforcement by the foreign nation if the reciprocity defense were raised.

The reach of the Proposed Act's reciprocity provision appears to extend even to those judgments redressing individual rights that the United States seeks to protect. The Proposed Act's effect on human rights claims illustrates the Proposed Act's extreme scope. Presumably, foreign nations whose courts enter injunctions prohibiting human rights abuses, or whose courts additionally reward monetary damages to torture victims, would likely recognize and enforce a "comparable" U.S. judgment such that the reciprocity provision of the Proposed Act would have no impact.

However, imagine the following situation: Foreign court X awarded damages to individual A for a private corporation's human rights violations. In a separate case brought by individual B, foreign court X refused to recognize and enforce a U.S. judgment brought under the Alien Torts Claims Act ("ATCA")[106] and its counterpart, the Torture Victim Protection Act of 1991 ("TVPA")[107], which allow non-U.S. citizens to recover damages in U.S. federal courts for human rights abuses, because personal jurisdiction over the defendant in this case was

104. *See id.* § 2(b)(i).
105. *See id.* § 1(A)(i)-(iii).
106. 28 U.S.C. § 1350 (2000).
107. *Id.*

based on "tag" service of process.[108] This basis of jurisdiction, where a defendant is provided notice when temporarily passing through a U.S. jurisdiction, is not permitted by many foreign nations, including some European states.[109] The Proposed Act's reciprocity provision suggests that if the nation in which foreign court X sits has not entered into a reciprocal agreement with the United States, a U.S. federal or state court would not be permitted to recognize and enforce the damages awarded by foreign court X if the judgment debtor—who committed the human rights violations—raised the reciprocity defense and the U.S. judgment was deemed "comparable" to that of foreign court X. While the award would remain enforceable in the foreign country, individual A would not be remedied by the foreign judgment if the judgment debtor relocated its assets to the United States. Instead, he or she would have to bring a separate lawsuit in the United States simply because foreign court X refused to recognize a "comparable," but completely distinct, judgment involving individual B. Here, the U.S. court's refusal would appear to be more than an inducement for foreign nations to recognize and enforce U.S. ATCA and TVPA judgments. The court's actions would appear to be repugnant to the United States' own values. While this inconsistent result might persuade the foreign nation to enter into a reciprocity agreement with the United States, this retrospective remedy would do nothing to alleviate the damages incurred by this victim.

In essence, while a court in the United States might refuse to recognize and enforce a foreign judgment on the grounds of public policy, such as foreign libel judgments which conflict with values preserved by the First Amendment,[110] a reciprocity requirement might preclude a court in the United States the authority to recognize and enforce a foreign judgment where *denying recognition and enforcement* would, in fact, violate U.S. notions of fairness and justice.

B. No Uniformity Between Sections 7(a) and 7(e) of the Proposed Act

In its original draft of the Proposed Act, the ALI contemplated

108. "Tag" service of process was first addressed in *Burnham v. Superior Court*, 495 U.S. 604, 627 (1990), in which the U.S. Supreme Court held that due process was satisfied because service of process to the defendant was provided when the defendant was in the relevant forum.

109. *See* Edward A. Amley, Jr., *Sue and Be Recognized: Collecting §1350 Judgments Abroad*, 107 Yale L.J. 2177, 2183–84 (1998).

110. *See* Christine Duh, *Cyberlaw: Internet Jurisdiction: International:* Yahoo! Inc. v. LICRA, 17 Berkeley Tech. L.J. 359, 368 (2002) (discussing the state and federal courts' refusal to enforce foreign judgments "which offend free speech values protected by the First Amendment"); *see also* Eric P. Enson, *A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?*, 21 Loy. L.A. Int'l & Comp. L.J. 159, 166 (1999) (discussing the conflict between English common law and the United States Constitution in regards to freedom of speech).

three variations of a reciprocity requirement. The first version reflected current American jurisprudence, that reciprocity not be required for the recognition and enforcement of foreign judgments.[111] The second version permitted the judgment debtor to raise a reciprocity defense, and in so doing, demonstrate by "clear and convincing evidence" the absence of reciprocity.[112] Scholars have termed this a "case-by-case approach" to the issue of recognition and enforcement. The third version, in stark contrast to the second, created a bright-line rule whereby the Secretary of State would pronounce which foreign nations fulfilled the reciprocity requirement. All judgments rendered in a nation within this category would then be recognized and enforced, only subject to limited defenses. This procedure is termed an "all-or-nothing" approach.[113]

The final version of the Proposed Act, though, incorporates *both* the case-by-case and modified all-or-nothing approaches. Far removed from the ALI's goal of establishing uniformity in a disjunctive area of American jurisprudence, section 7 of the Proposed Act will leave foreign nations in the same state of confusion from which they currently suffer in determining whether their judgments will be recognized and enforced in the United States. First, section 7(a) alone fails to provide the predictability necessary to encourage foreign nations to recognize and enforce U.S. judgments, the ALI's purpose in including a reciprocity defense to the Proposed Act. Specifically, sections 7(a)–(b) allow a judgment debtor to raise the reciprocity defense and then place the burden upon him to prove that reciprocity does not exist for a comparable U.S. judgment.[114] Under this scheme, a foreign nation would be unclear as to whether the Proposed Act's reciprocity requirement would preclude the U.S. court from recognizing its judgment because it would not be able to predict whether the judgment debtor would raise the reciprocity defense in the first place.

Even where section 7(a) is considered concurrently with section 7(e), which gives the Secretary of State the power to enter reciprocal arrangements with foreign nations, section 7(a) might induce instability in U.S. recognition and enforcement law. Establishing reciprocal arrangements with foreign nations is no easy task, as evidenced by the United States' previous attempts with England. Section 7(a), then, would more likely be invoked in many, rather than few, cases if foreign nations were given a choice between the two.

Moreover, uncertainty remains whether, if the defense is raised, the

111. *See* AMERICAN LAW INSTITUTE, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT 30–60, (Council Draft No. 1, Nov. 20, 2001).

112. *Id.*

113. Stevens, *supra* note 27, at 131.

114. *See* PROPOSED ACT, *supra* note 21, § 7(a)–(b).

judgment debtor will satisfactorily prove that reciprocity does not, in fact, exist. Section 7(b) permits the judgment debtor to rely upon expert testimony or judicial notice "if the law of the state of origin or decisions of its courts are clear" to satisfy his or her burden of proof.[115] However, section 7(c) indicates that the final determination of whether the reciprocity condition is met may be predicated upon the court's evaluation of whether the foreign nation's courts deny enforcement to: (1) judgments against its own nationals in favor of nationals of another state; (2) judgments originating in U.S. federal or state courts; (3) compensatory damages awarded in actions for personal injury or death; (4) judgments for statutory claims; and (5) U.S. federal or state court judgments of a type similar to the foreign judgment at issue. The court may also consider whether the foreign nation recognizes other nations' judgments.[116]

The Proposed Act does not indicate what specific circumstances would trigger necessary judicial review of these factors if reciprocity were raised as a defense. Nor does it indicate which of the six factors must be considered. In fact, the list, while "illustrative" of the existence of reciprocity, is "not exhaustive, and no one factor is conclusive."[117] The court is simply directed to inquire, "as appropriate," whether the foreign nations would deny enforcement in the listed circumstances.[118] The Proposed Act's plain language places broad discretion in the hands of the U.S. judge. She not only determines how much weight to place upon the evidence presented by the judgment debtor as to the existence of reciprocity, but she also decides whether to consider any one of the factors identified in section 7(c) and to what extent, if any, they weigh towards a finding of reciprocity. Sections 7(a), 7(b) and 7(c) create more confusion than clarity for foreign courts. As a result, a U.S. court's decision whether to recognize and enforce a foreign judgment may or may not be based on unpredictable factors: a judgment debtor's decision whether to raise a reciprocity defense, his ability to prove lack of reciprocity, a U.S. court's decision whether to consider the factors in

115. *Id.* § 7(b). A previous version of the Proposed Act had provided for two possible burdens of proof, specifically stating that "[o]nce the defense of lack of reciprocity is raised, [the judgment creditor or other person seeking to rely on the foreign judgment shall have the burden to show that the courts of the state of origin would grant recognition and enforcement to comparable judgments of courts in the United States.] [the party resisting recognition or enforcement shall have the burden to show that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States.]" AMERICAN LAW INSTITUTE, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT § 7(b) (Tentative Draft No. 2, Apr. 13, 2004). In the final version of the Proposed Act, the ALI adopted the latter approach, imposing the burden to prove the lack of reciprocity upon the judgment debtor. PROPOSED ACT, *supra* note 21, § 7(b).

116. *See id.* § 7(c)(i)–(v).

117. *Id.* § 7 cmt. f.

118. *Id.* § 7(c).

section 7(c) and, if so, which factors to consider, and to what extent such factors do or do not lead to a finding of reciprocity.

Additionally, while precedent might eventually be used as a test to determine whether reciprocity exists, its scope might be limited. For example, in evaluating whether a foreign nation would recognize and enforce a "comparable" U.S. judgment, a judge might define "comparable judgment" more narrowly than defined in prior cases such that those prior cases might not constitute binding precedent. Assume the California Supreme Court determined in a breach of contract case between a U.S. plaintiff and foreign defendant that the foreign nation in which the defendant resides recognizes and enforces "comparable" U.S. money-judgments, defining "comparable judgments" as those breach of contract judgments based on contract law principles upon which U.S. courts rely. However, a California trial court, presented with a breach of contract case in which a foreign government has breached its loan agreement with a U.S. bank might treat this case as one of first impression, finding that precedent for breach of contract cases between private parties is not binding upon breach of contract cases between foreign governments and private parties. Given the discretion judges have under section 7(c) to consider multiple factors in determining whether reciprocity exists, and the limited value precedent may have if judges interpret "comparable judgments" differently, section 7(c) does not alleviate, but rather adds to, the confusion posed by the Proposed Act.

In contrast, section 7(e) concentrates discretion in the hands of the Secretary of State, permitting her to enter into reciprocal agreements for particular types of judgments with foreign nations. Unlike the authority provided under section 7(c), a U.S. judge has no discretion under section 7(e) whether to consider an existing reciprocal agreement as just one factor indicating that reciprocity does exist. Rather, a reciprocal agreement is conclusive evidence that reciprocity exists regarding judgments covered by the agreement.[119] The agreements "need not be formal treaties, but could be Memoranda of Understanding, exchanges of Diplomatic Notes, or similar bilateral declarations . . . ."[120]

On its face, section 7(e) appears to establish the predictability that foreign nations seek from the United States regarding recognition and enforcement jurisprudence. A foreign nation is guaranteed that if it enters into a bilateral reciprocal arrangement with the United States, judgments covered by the agreement will be recognized so long as none of the traditional defenses to recognition are raised. In fact, such a rule might actually encourage foreign nations to enter into these reciprocal

119. *See id.* § 7 (e).
120. *Id.* § 7 cmt. c.

agreements with the United States, a key reason the ALI chose to incorporate this alternate form of reciprocity into the Proposed Act.[121] However, section 7(e) does not stop there. Instead, it provides that:

> The fact that no such agreement between the state of origin and the United States is in effect, or that the agreement is not applicable with respect to the judgment for which recognition or enforcement is sought, does not of itself establish that the state fails to meet the reciprocity requirement of this section.[122]

The rigid, bright-line rule first established by section 7(e) is thus diluted by that section's subsequent language. Reading section 7(e) in conjunction with section 7(b), it appears that section 7(b) creates a presumption that reciprocity exists, which must be rebutted by a judgment debtor resisting recognition or enforcement. A judgment creditor could *always* rely upon section 7(b) as a blockade to a judgment debtor's attempt to preclude recognition and enforcement. Section 7(e), then, merely acts as a safe harbor for a judgment creditor. As a result, the message conveyed by section 7(e) is muddled. Foreign nations are told that if they want to guarantee that the Proposed Act's reciprocity defense does not hinder the recognition and enforcement of their judgments in the United States, they ought to enter bilateral reciprocal agreements with the United States. However, they are also told the reciprocity defense will be ineffective, even if they do not have reciprocal agreements with the United States, if the judgment debtor is unable to show "substantial doubt" that reciprocity exists.

Some proponents of a reciprocity defense may support the ALI's attempt to provide a flexible process for establishing reciprocity—a case-by-case or a reciprocal agreement analysis.[123] In fact, in supporting the inclusion of a reciprocity defense in the Proposed Act, one commentator suggested that the ALI's failure to impose a bright-line standard in determining whether reciprocity exists indicates the ease with which the reciprocity requirement may be met.[124] Likewise, game theorists have commended the Proposed Act's "flexible solution" of "combin[ing] the flexibility of the case-by-case approach from Version A with a softer

121. *See id.* § 7 cmt. b ("Subsection (e) is designed to provide the incentive to foreign states of avoiding lengthy and possibly expensive proceedings to secure recognition and enforcement of judgments rendered in their courts.").

122. *Id.* § 7(e).

123. *See* Franklin O. Ballard, Note, *Turnabout Is Fair Play: Why a Reciprocity Requirement Should Be Included in the America Law Institute's Proposed Federal Statute*, 28 HOUS. J. INT'L L. 199, 234 (2006) ("The United States is clearly at a fundamental bargaining disadvantage. The addition of the reciprocity requirement will help level the playing field and allow the Department of State to better represent U.S. interests in future negotiations . . . . [T]he United States has an inherent right to protect its interests . . . .").

124. *See id.* at 227 (explaining how, under section 7(c) of the Proposed Act, if a foreign state recognizes third states' judgments absent a treaty, such conduct might be sufficient proof of reciprocity by foreign nations for purposes of the Proposed Act's reciprocity provision).

version of the leveraging power from the all-or-nothing procedure of Version B."[125] However, if the Proposed Act is to have any weight in inducing foreign nations to enter into reciprocal agreements with the United States, section 7(e) must be read with the assumption that a foreign nation would find the likelihood that the judgment debtor would successfully disprove reciprocity more burdensome than entering a bilateral reciprocal agreement with the United States. In other words, section 7(e) might only induce a foreign nation to enter into a reciprocal agreement if the foreign nation were more willing to recognize and enforce U.S. judgments than to incur the risk that the United States would not recognize and enforce its own judgments. The assumption that a foreign nation would make such a sacrifice seems far-reaching, particularly where section 7 establishes a presumption of reciprocity which the judgment debtor has the burden to rebut. As mentioned earlier, precedent might act as limited leverage given the discretion U.S. judges would receive under the Proposed Act to define the scope of "comparable judgments" and apply factors they deem relevant in determining whether reciprocity exists.

Scholars have agreed that, regardless if the recognition and enforcement of foreign judgments in the United States should be predicated on a reciprocity requirement, the time has arrived to present a unified approach upon which foreign nations may rely in predicting whether their judgments would be recognized and enforced in the United States. The ALI incorporated a reciprocity defense that might be considered a "compromise" of sorts, perhaps to alleviate the heavy criticism it faced for including the defense in the first place.[126] While a commendable approach, its effect might be disappointing because, faced with a choice between a U.S. court refusing to recognize and enforce one of its judgments versus the burden to recognize and enforce all U.S. judgments covered by an agreement, a foreign nation might well choose the former, particularly since a judgment debtor might not raise the reciprocity defense. A foreign nation might choose the latter if the Proposed Act was complimented with political pressure from the United States, perhaps in the form of business transaction restraints. However, alone, the Proposed Act does not appear to have the persuasive power it was designed to exert.

---

125. Stevens, *supra* note 27, at 155.

126. *See* PROPOSED ACT, *supra* note 21, § 7 cmts. b, g. *Compare id.* § 7 cmt. g (describing how the burden of proof, under section 7(b), on the party resisting recognition or enforcement is intended to "minimize the obstacles to rapid and efficient enforcement of foreign judgments, and on the other hand to provide genuine incentives to states to assure reciprocal treatment to judgments rendered in the United States"), *with id.* § 7 cmt. b (noting that section 7(e), the reciprocal arrangement provision, was "designed to provide the incentive to foreign states of avoiding lengthy and possibly expensive proceedings to secure recognition and enforcement of judgments rendered in their courts").

IV. FINDING A DIFFERENT COMPROMISE: THE EXTENT TO WHICH RECIPROCITY SHOULD BE INCLUDED IN THE PROPOSED ACT

The Proposed Act's reciprocity provision was not designed to impose additional burdens to secure the recognition and enforcement of foreign judgments, "but rather [was designed] to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States."[127] This goal will likely not be achieved by the Proposed Act in its current form because section 7 essentially creates a presumption that reciprocity exists, while placing a high burden to rebut this presumption on the party resisting recognition or enforcement. A foreign nation might have greater incentive to await the results of the judgment debtor's efforts, rather then enter into a reciprocal arrangement with the United States. To create an incentive for foreign countries to recognize and enforce U.S. judgments, section 7 of the Proposed Act must be revised. Two possible routes are detailed below.

A. BRIGHT-LINE RULE

It is difficult to imagine that a foreign nation would be induced to enter into a reciprocal agreement with the United States if such an agreement were not a mandatory requirement for the recognition and enforcement of a foreign judgment in the United States. If section 7(e) is to successfully persuade foreign nations to enter into these agreements, it must demand that such agreements exist before foreign judgments will be recognized and enforced. Just as courts refuse to recognize and enforce foreign public law where legislation or treaties do not exist, perhaps they should also refuse to do so for private international law. Although he does not endorse a reciprocity defense regarding private parties' claims, Professor William Dodge describes the similarity between private international law and public law which might justify such a response:

> The basic point is that the enforcement of judgments is necessary to make a legal system effective .... Just as the enforcement of foreign judgments is necessary to make the legal rules that facilitate trade (primarily the rules of contract law) optimally effective, so too the enforcement of foreign judgments is necessary to make the rules that regulate trade to prevent harm (like antitrust and securities law) optimally effective. If judges should nonetheless refuse to enforce foreign penal, tax, and regulatory law in order to facilitate cooperation by the political branches of government, perhaps they should do the same with private law.[128]

Nevertheless, in objecting to a reciprocity defense to private law claims,

127. *Id.* § 7 cmt. b.

128. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 229 (2002).

he argues that reciprocity should too be disregarded in foreign public law claims where the plaintiff is a private party.[129]

The burden currently imposed on the judgment debtor to prove lack of reciprocity does not create an incentive for foreign nations to enter reciprocal agreements. Neither would the alternative burden of proof—proffered in a previous draft of the Proposed Act but later rejected—outweigh the burden imposed on foreign nations by a reciprocal agreement. This alternative approach would place the burden of proof on the judgment creditor to prove that reciprocity exists. In this case, a foreign nation might have to weigh its options more carefully in deciding whether to enter a reciprocal agreement with the United States or to subject judgment creditors, who presumably are its own citizens in most cases, to the burden of proving that reciprocity exists. Albeit a more difficult decision, it still seems unlikely that the foreign nation would be willing to recognize all U.S. judgments falling within a specific category, a possibility in the face of a reciprocal agreement, simply so that the United States would recognize one of its own comparable judgments.

B. Coercion Through Example: Rejecting a Reciprocity Defense

The primary criticism against a bright-line reciprocity rule, or, for that matter, against any version of reciprocity, is rooted in the principle of fairness.[130] Professor Patrick Borchers, an ALI member, noted at the Annual Meeting in May 2000 the unfairness in forcing parties to re-litigate a matter that a U.S. court has determined "has been fairly tried in a foreign forum just in an effort to implement policies entirely external to those litigants."[131] Private litigants' rights declared and remedied in a judicial proceeding should not be treated as collateral in the United States' negotiations with foreign countries to reach accord on the issue of recognition. Moreover, some critics have argued that "[w]hile it is clearly unfair to punish citizens of a foreign country for the policies of their government, retaliation against non-citizens of that foreign jurisdiction, including U.S. citizens, is even more misguided."[132] As the ALI's reciprocity provision is not limited to foreign judgments favoring foreign creditors, a U.S. creditor's ability to recover under a favorable foreign judgment may be subject to just as much risk under the Proposed Act.[133]

While a bright-line reciprocity rule may be exactly what the United States needs in its arsenal as a guaranteed incentive for foreign nations to recognize and enforce U.S. judgments, this approach sacrifices private

129. *See id.* at 234–35.

130. *See* Miller, *supra* note 42, at 300–02.

131. Patrick J. Borchers, *Proceedings of the 77th Annual Meeting of the American Law Institute*, 77 A.L.I. Proc. 223 (2000).

132. Miller, *supra* note 42, at 300.

133. *See id.*

litigants' rights for a public interest—the recognition and enforcement of U.S. judgments globally.[134] Criticism of this effect rests in the assumption that public law and private international law are distinct spheres.[135] This assumption has been gradually weakened by the increasing "interconnectedness of private international law and international affairs" and its recognition by courts, which now address a growing number of transnational disputes.[136] That the fine line between public and private international law is blurred, however, should not justify depleting private litigants' rights to recover under favorable judgments. As one scholar has summarized succinctly: "Fairness demands that the interests of private parties seeking to enforce foreign law not be held hostage to the government's interest in promoting reciprocity."[137] U.S. public interest in enhancing international commerce, promoting international cooperation, and obtaining leverage against foreign nations—albeit compelling—should not be strengthened to the complete detriment of the individual litigant's right to justice.

A second approach to revising the Proposed Act's reciprocity provision could induce foreign nations to recognize and enforce U.S. judgments, not by force, but by example. A federal statute, without a reciprocity requirement, would perhaps provide the level of predictability foreign nations need to more willingly recognize and enforce U.S. judgments.[138] The recognition and enforcement of foreign judgments is currently reserved as an issue of state law. When deciding whether to recognize and enforce U.S. judgments, foreign nations must undertake the complicated task of deciphering the recognition law of the state which rendered the judgment. That at least eight states, Massachusetts, Texas, Georgia, Ohio, Idaho, North Carolina, Florida and Maine, have adopted reciprocity as either a discretionary or mandatory ground for non-recognition only adds to the complexity of this task.[139]

Establishing a bright-line reciprocity defense creates two additional problems. First, scholars argue that the United States and foreign nations which require reciprocity as a precondition to recognition will be trapped in a vicious cycle.[140] Essentially, the circular problem of *renvoi*[141] would

134. *See* Louisa B. Childs, *Shaky Foundations: Criticism on Reciprocity and the Distinction Between Public and Private International Law*, 38 N.Y.U. J. INT'L L. & POL. 221, 227 (2005).

135. *See id.* at 230.

136. *Id.* at 269.

137. Dodge, *supra* note 128, at 230. Dodge emphasizes, though, that fairness justifies a distinction between public and private *plaintiffs*, not public and private law. *Id.* That is, private parties, regardless of whether they bring a private or public law claim, must remedy the harm they suffered without the power to negotiate enforcement with a foreign jurisdiction; public parties, on the otherhand, are in the position to negotiate with foreign jurisdictions. *Id.* at 231.

138. *See* Brand, *supra* note 43, at 300.

139. *See id.* at 277.

140. *See* Miller, *supra* note 42, at 316.

arise, where both the United States and the foreign nation would refuse to recognize one another's judgments for failure to reciprocate. Moreover, even though the ALI asserts that the Proposed Act would satisfy a foreign nation's requirement that proof of reciprocal treatment be presented before recognition is permitted,[142] foreign nations have no obligation to treat the Proposed Act as sufficient to fulfill this requirement.[143]

Second, even those foreign nations which do not require reciprocity as a precondition to recognition might resent the United States' attempt to force foreign nations to recognize U.S. judgments, and consequentially, they might choose not to succumb to pressure imposed by the United States. Alternatively, those foreign nations might simply ignore the Proposed Act's reciprocity requirement in determining whether to recognize and enforce U.S. judgments. Just as the Proposed Act includes various defenses to recognition aside from reciprocity, so do the laws of foreign nations. A foreign court might choose not to recognize a U.S. judgment because the judgment violates the foreign nation's standards in regards to personal jurisdiction, notice, or public policy, for example. In other words, the United States' threat not to recognize a foreign judgment might not have any impact on a foreign nation's decision on whether to recognize a U.S. judgment.

The Proposed Act, absent a reciprocity requirement, would avoid creating problems of hostility and confusion among foreign nations. Foreign nations would not be forced to muddle through state statutes and case law to decipher individual states' law on recognition, nor would the United States present a confrontational approach to recognition and enforcement of foreign judgments. Simultaneously, the Proposed Act would still permit U.S. courts to refuse recognition and enforcement. Indeed, section 5 of the act delineates both mandatory and discretionary defenses to recognition. Mandatory grounds for non-recognition are that: (1) the foreign judgment is "rendered under a system . . . that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness"; (2) the foreign judgment is "rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question"; (3) the basis for jurisdiction is unacceptable under section 6; (4) the defendant does not receive reasonable notice; (5) the judgment is obtained by fraud; (6) the judgment is repugnant to the public policy of the United States or a particular state of the United States where the relevant issue is governed by state law; or (7) the foreign judgment

141. *See* Ballard, *supra* 123, at 229–30.

142. *See* PROPOSED ACT, *supra* note 21, § 7 cmt. e.

143. *See* Miller, *supra* note 42, at 316–17.

"result[s] from a proceeding undertaken contrary to an agreement under which the dispute was to be determined exclusively in another forum," with some exceptions to this last rule.[144] The Act's decision to treat the fourth, fifth and sixth defenses as mandatory is a departure from the Recognition Act, in which these defenses are only discretionary.[145] Accordingly, the discretionary grounds for non-recognition under the Proposed Act have also been altered as compared to the Recognition Act. The Proposed Act permits a court to consider the following discretionary defenses to recognition: (1) the rendering court lacks prescriptive or subject matter jurisdiction; (2) the judgment conflicts with another foreign judgment entitled to recognition or enforcement under the Proposed Act which involves the same parties; (3) a U.S. proceeding on the same subject matter involving the same parties commenced before the foreign proceeding and the U.S. proceeding was not stayed or dismissed; or (4) the proceeding was intended to interfere with adjudicating the claim in "a more appropriate court in the United States."[146]

A critical difference between these discretionary defenses and the discretionary factors a judge may consider in determining whether reciprocity exists is that the former are predictable, while the latter are not. Presumably, a judgment creditor and the foreign court in which he or she brings a lawsuit would know whether that court has subject matter jurisdiction and whether the court's judgment would conflict with another final judgment. Moreover, the judgment creditor would know whether another party commenced a U.S. proceeding on the same claim or would have, in fact, commenced the U.S. lawsuit him or herself. Accordingly, the judgment creditor would also know whether the proceeding was intended to interfere with adjudicating the claim in a U.S. court. While the discretionary nature of these defenses creates some uncertainty for a foreign nation as to whether a U.S. court will refuse to recognize and enforce judgments rendered in its courts based on any of these defenses, their existence *is* certain. The discretionary nature of the reciprocity defense, however, creates uncertainty both as to whether the reciprocity defense actually exists and, then, whether a U.S. court will refuse recognition and enforcement for lack of reciprocity. A judgment debtor has discretion whether to raise a reciprocity defense in the first place, and a U.S. court has discretion as to which factors to consider and how to define the scope of "comparable judgments." A second distinction between the discretionary defenses in section 5 and the reciprocity defense in section 7 is that the former defenses are directly

144. PROPOSED ACT, *supra* note 21, § 5(a)(i)–(vi), 5(b)(i).

145. *See* UNIF. FOREIGN-Country MONEY JUDGMENTS RECOGNITION ACT, *supra* note 20, § 4(b)–(c).

146. PROPOSED ACT, *supra* note 21, § 5(c)(i)–(iv).

correlated to the case in which any of the defenses are raised. In contrast, the reciprocity defense may be invoked even if no procedural or substantive deficiency exists with the foreign judgment. As one commentator has stated, a reciprocity defense would create an "inherent unfairness of punishing litigants for national policies over which they have no control."[147]

In light of the various defenses to recognition available under the Proposed Act, a court would not be forced to recognize and enforce a foreign judgment even if the reciprocity defense were unavailable. A foreign nation, likewise, would not be forced to recognize and enforce a U.S. judgment in comparable circumstances. Instead, the Proposed Act's defenses would provide uniform standards by which foreign nations could compare their own judicial proceedings to determine whether a U.S. court would recognize and enforce their judgments. In turn, this predictability might lead to foreign nations' greater willingness to recognize and enforce U.S. judgments.

C. Combining Reciprocity and Non-Reciprocity

The ALI's Proposed Act has the potential to move one step towards a seemingly impossible goal—encouraging the recognition and enforcement of U.S. judgments to preserve an individual's right to judicial remedies. Section 10 of the Proposed Act may be a catalyst towards accomplishing this goal. In response to a 2002 version of the Proposed Act, which included a registration process but did not make the process contingent upon reciprocity, one commentator suggested enacting a reciprocity requirement with respect to registered judgments as a compromise between a "full-blown reciprocity requirement" and the fairness concerns vocalized by critics of reciprocity.[148] Section 10 of the Proposed Act now states that

> a foreign judgment issued by the court of a state that has entered into an agreement with the United States for reciprocal recognition of judgments pursuant to § 7(e) of this Act may be registered in accordance with this section in any United States court for a district in which the judgment debtor has property when the debtor (if an individual) is domiciled in the state or (if a juridical entity) has an establishment in the state. Alternatively, a judgment may be registered in any United States court for a district in which the judgment debtor has substantial assets. . . . This section authorizes registration only of money judgments[.][149]

The ALI Reporters originally proposed the requirement that a foreign nation must enter into a reciprocal agreement with the United

147. Miller, *supra* note 42, at 299.

148. Danford, *supra* note 68, at 423.

149. Proposed Act, *supra* note 21, § 10(a).

States to invoke the registration process in the ALI's 2004 Tentative Draft No. 2.[150] This proposed requirement was designed "[i]n response to discussion about whether registration is appropriate in the foreign-judgment context."[151] As the registration process is only available for those judgments rendered in foreign nations which enter into reciprocal agreements with the United States, the ALI Reporters intended "the availability of registration . . . [to] serve as an incentive to foreign states to enter into such an agreement."[152]

However, the potential of utilizing the reciprocity requirement as leverage to induce foreign nations to enter these agreements is weakened by the reciprocity defenses in section 7. As section 7 gives a foreign nation two options, entering a reciprocal agreement with the United States or awaiting whether a judgment debtor can successfully prove lack of reciprocity, section 7 provides minimal, if any, incentive for a foreign nation to enter into a reciprocal agreement. As discussed in section IV.B, a foreign nation is more likely to choose the latter option; that is, to impose a burden on the judgment debtor to establish lack of reciprocity. Consequently, a foreign nation must balance the registration incentive directly against the case-by-case reciprocity defense to determine whether to enter into a reciprocal agreement with the United States. If a foreign court perceives the benefits of registration as outweighing the burden imposed by a U.S. court failing to recognize the foreign court's judgments on a case-by-case basis, a foreign nation might be induced to enter into a reciprocal agreement with the United States. However, if the balance is essentially even, or the benefits of registration weigh only slightly more heavily, the enticing effect sought by the ALI Reporters might not be achieved.

The United States may be much more successful in encouraging the recognition and enforcement of foreign judgments abroad, while respecting the fairness concerns vocalized by critics of the reciprocity defense, by preserving a bright-line reciprocity agreement requirement to registration in section 10 and eliminating the reciprocity defense in section 7. This approach has been relied upon by two of the United States' major trading partners, England and Canada, for the recognition and enforcement of foreign money-judgments.[153] Under the laws of both foreign nations, a U.S. money-judgment is never automatically precluded recognition and enforcement simply on the grounds of lack of reciprocity. A litigant seeking to enforce a U.S. money-judgment is prohibited from seeking recognition only through an expedited route

150. AMERICAN LAW INSTITUTE, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT § 10 (Tentative Draft No. 2, Apr. 13, 2004).

151. *Id.* at xix, reporters' memo.

152. PROPOSED ACT, *supra* note 21, § 10(a) cmt. a.

153. *See* SURVEY ON FOREIGN RECOGNITION, *supra* note 68, at 18–19.

absent a reciprocal agreement with England or Canada. As the United States lacks any such agreements, a litigant may not pursue the expedited route. However, he or she may still bring a cause of action to enforce the judgment under the foreign nation's common law.[154]

This approach to inducing foreign nations to enter into reciprocal agreements with the United States seems to rest upon the assumption that the political processes in those nations will act as the catalysts for inducement. For example, assume that foreign nation X has declined to enter into a reciprocal agreement with the United States. Citizens from nation X forced to pursue a cause of action route for recognition and enforcement of a favorable judgment, rather than an expedited route, might vocalize their frustration to nation X's governmental heads. Individuals who are not citizens of nation X, but who nevertheless entered into business transactions with companies incorporated in nation X which maintain the majority of their assets in the United States, might be discouraged from engaging in further transactions where nation X has not entered into a reciprocal agreement with the United States, since the enforcement process will not be simplified and expedited through registration in the United States.

To account for the possibility that foreign nations might choose not to recognize and enforce U.S. judgments because those judgments stand contrary to public policy of foreign nations, section 10 should permit foreign nations to enter reciprocal arrangements which do not bar them from denying recognition and enforcement due to public policy concerns. The language of section 7(d) would adequately provide such permission, stating that "[d]enial by courts of the state of origin of enforcement of judgments for punitive, exemplary, or multiple damages *shall not* be regarded as denial of reciprocal enforcement of judgments for the purposes of this section if the courts of the state of origin would enforce the compensatory portion of such judgments."[155] By relieving a foreign nation from recognizing and enforcing a U.S. judgment for punitive, exemplary or multiple damages, the Proposed Act will likely eliminate a foreign nation's major apprehension to enter a reciprocal agreement with the United States. While the incentives created by a registration process will not guarantee that foreign nations will be induced to enter reciprocal agreements, the expedited route/cause of action dichotomy does provide a subtle, yet significant distinction in levels of burden that might be just enough to sway some foreign nations to enter reciprocal agreements.

The ALI will accomplish three critical objectives by removing the unpredictable reciprocity defense presented in section 7 and preserving the bright-line reciprocity agreement requirement to registration in

154. *See id.*

155. PROPOSED ACT, *supra* note 21, § 7(d) (emphasis added).

section 10. First, the Proposed Act will not unduly burden private litigants, foreign and U.S. citizens alike, with the cost and time expenditures in re-litigating claims. The principles of res judicata and fairness will thus be preserved. Second, judgment debtors will still be held liable by the foreign judgments since judgment creditors will be permitted, regardless of whether reciprocity exists, to bring an enforcement action.[156] Third, the United States will communicate to foreign nations a cogent, unified approach to recognition and enforcement. Foreign nations, individuals, and businesses will be spared the complexities and confusion in deciphering the laws of fifty different jurisdictions and may be, even if only slightly, induced to enter reciprocal agreements with the United States.

CONCLUSION

A favorable judgment is meaningless without a mechanism to enforce the judgment in a nation in which the judgment debtor, or the judgment debtor's assets, resides. Just as a private litigant may suffer loss from a breach of contract if he cannot recover damages in another country, he may too suffer human rights violations without receiving damages as a torturer escapes liability if judgments are not enforced abroad. In the twenty-first century, where transportation and information technologies allow individuals and corporations to transcend national borders, implementation of justice depends upon the universal recognition and enforcement of judgments. Although the world's sovereignties have the right to deny enforcement of a foreign judgment based on different notions of justice, private litigants should not be punished by a reciprocity defense having nothing to do with the judgment in question. While it is difficult to determine the extent to which the uncertainty inherent in the current American recognition and enforcement regime is creating problems in enforcing judgments and, indirectly, commerce between the United States and foreign nations, professor and ALI Reporter Linda Silberman notes that "[m]any countries are quite restrictive when it comes to respecting foreign judgments, and some countries are particularly hostile to recognition or enforcement of U.S. judgments."[157]

The ALI's Proposed Act presents the United States with a critical opportunity to share a unified notion of justice with the world, and thereby induce the recognition and enforcement of American judgments, without belittling those of other nations. The Proposed Act should not

156. *See* Miller, *supra* note 42, at 302 (arguing that the reciprocity provision included in the ALI's Tentative Draft, dated April 14, 2003, would "unfairly grant judgment debtors a second bite at the apple and allow them to escape the consequences of their choice to do business or pursue litigation in a certain jurisdiction").

157. Silberman, *supra* note 87, at 1435.

include a reciprocity defense in section 7, but it should continue to mandate that foreign nations enter reciprocal agreements with the United States to benefit from the Proposed Act's registration process of section 10, through which a foreign judgment is treated as a U.S. judgment for purposes of immediate enforcement. By enacting this revised version of the Proposed Act, Congress can seize this moment to create an effective reciprocity regime while sharing a unified method for achieving justice with the world.